Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-338

J. C. BALLENTINE,
HATCHER POINT MALL MERCHANT'S
ASSOCIATION, INC., *et al.*,

Appellants,

v.

R. W. WILLINGHAM, R. L. TONNING, C. C. McCRAY,
SAM DUBOSE, T. HENRY CLARKE, as Commissioners
of the City of Waycross; TOM GATTIS, as City
Clerk and Treasurer of the City of Waycross;
AL CRACE, as City Manager, and THE CITY OF
WAYCROSS, GEORGIA, *et al.*,

Appellees.

ON APPEAL FROM THE SUPREME COURT
OF GEORGIA

JURISDICTIONAL STATEMENT

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ON APPEAL FROM THE SUPREME COURT
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JURISDICTIONAL STATEMENT

Appellants submit herewith their jurisdictional statement as required by Rule 15 of the Rules of the Supreme Court of the United States.

OPINION BELOW

The opinion of the Supreme Court of Georgia is unreported and is attached hereto as Appendix A.

GROUNDS OF JURISDICTION

a. The appellants brought a declaratory judgement action, naming officials of the City of Waycross, Georgia, as defendants, in which they sought to have Georgia Laws 1972, pp. 2970-2972 declared unconstitutional, being violative of, and repugnant to the Fourteenth Amendment to the Constitution of the United States of America. The Act annexed a certain area into the City of Waycross effective January 1, 1976.

The complaint specifically put in contest the constitutionality of Georgia Laws 1946, pp. 82-83, codified as Section 47-801 of the Code of the State of Georgia of 1933, as amended, (hereinafter referred to as the Georgia Code), as being plainly violative of, and repugnant to the Fourteenth Amendment to the Constitution of the United States of America.

Appellants' complaint was filed in the Superior Court of Ware County, Georgia, pursuant to Section 81A-123, of the Georgia Code and pursuant to the Constitution of the State of Georgia and of the United States, and the laws and statutes of the State of Georgia and the United States, not limited to but including the following:

(a) Title 55 of the Georgia Code and Section 81A-165 of said code relating to the procedure and application for the granting of injunction;

(b) Title 37 of the Georgia Code dealing with equity;

(c) Title 110, Chapter 11 of said Georgia Code setting out the power, procedure and grant of declaratory judgements.

b. On June 8, 1976, the Supreme Court of the State of Georgia decided and entered its final judgement which affirmed the judgement of the Superior Court of Ware County, Georgia, dismissing the petition for failure to state a claim. Appellants filed their notice of appeal to the Supreme Court of the United States of America on July 26, 1976, with the Supreme Court of Georgia.

c. This appeal to the Supreme Court of the United States of America is taken pursuant to the United States Code Title 28, Section 1257 (2) which confers jurisdiction on appeal.

d. Cases sustaining the jurisdiction:

Huffman v. Pursue, Ltd. (1975) 420 U.S. 592
Cox Broadcasting Corp. v. Cohn (1975) 43 L.Ed. 2d 328
Railway Mail Association v. Corsi (1945) 326 U.S. 88
Commonwealth Bank v. Griffith (1840) 10 L.Ed. 352
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Gomillion v. Lightfoot (1960) 364 U.S. 339
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Commissioner v. Tower (1946) 327 U.S. 280
U.S. v. Reading Co. 226 U.S. 374
Western U. Tel. Co. v. Foster 247 U.S. 105
Nectow v. City of Cambridge (1928) 277 U.S. 183

e. The provisions of Georgia Laws 1972, pp. 2970-2972, as amended by Georgia Laws 1973, pp. 3216-3218, are lengthy and the pertinent text is set forth in Appendix B and C.

The provisions of Georgia Laws 1946, pp. 82-83 are lengthy and the pertinent text is set forth in Appendix D.

f. Appellant's notice of appeal filed in the Supreme Court of Georgia on July 26, 1976 is attached hereto as Appendix E.

QUESTIONS PRESENTED

1. Whether the final judgement of the Supreme Court of Georgia erred in affirming the validity of Georgia Laws 1946 pp. 82-83, codified as Section 47-801, the Georgia Code, challenged on federal constitutional grounds as being violative of, and repugnant to the Fourteenth Amendment to the Constitution of the United States?

2. Whether the final judgement of the Supreme Court of Georgia erred in affirming the validity of Georgia Laws 1972 pp. 2970-2972, as amended by Georgia Laws 1973, pp. 3216-3218, challenged on federal constitutional grounds as being violative of, and repugnant to the Fourteenth Amendment to the Constitution of the United States?

3. Whether the final judgement of the Supreme Court of Georgia erred in affirming the judgement of the Superior Court of Ware County, Georgia, dismissing the complaint for failure to state a claim upon which relief can be granted?

STATEMENT OF THE CASE

Appellants are all retail merchants doing business in the shopping center known as Hatcher Point Mall. Prior to the annexation complained of, J.C. Ballentine and others entered into long-term leases with the two owners of the territory, which leases created for them an estate for years, or a leasehold estate, in the realty passing out of the estate of the joint owners.

Without written or oral notice being given to the joint owners of the fee or any of the appellants, the territory known as Hatcher Point Mall was annexed into the City of Waycross, Georgia, by Georgia Laws 1972, pp. 2970-2972, effective January 1, 1975; later amended by Georgia Laws 1973, pp. 3216-3218 to change the effective date to January 1, 1976.

In 1972, the territory known as Hatcher Point Mall was at least one-quarter mile removed from the municipal limits. The property was not contiguous or adjacent to the municipal limits and was an open field. The annexation was accomplished by including into the description a one-quarter mile stretch of road designated U.S. Highway 1, from right-of-way line to right-of-way line.

The only notice given was that recited in the act as being published in the Waycross Journal Herald newspaper, pursuant to Georgia Laws 1946, pp. 82-83, Section 47-801 of the Georgia Code. The notice did not

identify any affected parties or persons and did not identify the subject property. In fact the notice wrongfully stated that the legislation would be introduced at the request of the unnamed landowners.

Appellants filed their complaint December 23, 1975, seeking to enjoin the annexation of the territory and to have declared unconstitutional the act of annexation and Section 47-801 of the Georgia Code as being violative of and repugnant to provisions of the Georgia Constitution and Amendment Fourteen of the United States Constitution. Appellants alleged violation of their private rights, due process of law both procedural and substantive, and equal protection of laws as protected by the Constitution of Georgia and Amendment Fourteen of the United States Constitution.

The failure or want of proper notice was alleged in detail:

8. The plaintiffs allege that the City of Waycross, Georgia, a political subdivision acting by and through its Board of Commissioners caused the following notice to be published:

'NOTICE OF INTENTION TO INTRODUCE LOCAL LEGISLATION

Notice is hereby given that there will be introduced at the regular 1972 session of the General Assembly of Georgia, a bill to amend the Charter of the City of Waycross so as to change the corporate limits thereof by incorporating at the request of the property owners a certain tract of land; and for other purposes;

This 4th day of February, 1972.

(s) Walter R. Vollenweider
Mayor, City of Waycross'

9. Said notice was the only notice given or published and appears in Georgia Laws 1972 Volume II as a portion of an Act of the General Assembly of Georgia to amend the City Charter thereby annexing the real property now known as Hatcher Point Mall into the municipal corporate limits of the City of Waycross effective January 1, 1975; said Act being reported in pages 2970 through 2972.

10. Said notice did not describe the property to be incorporated into the municipal limits; did not describe the property owners to be affected by the introduction of said special legislation; did not provide for a reasonable time or place for those interested in, or affected by, such legislation to make their appearance and be heard; did not attempt in any such way to reach those persons and parties to be finally affected by such special legislation, and said notice did not comply in any way with the requirements of due process, the Georgia Code, the Georgia Constitution and the U.S. Constitution and resulted in an unlawful final annexation of property by the City of Waycross without due process of law, to become effective by amendment on January 1, 1976.

15. (last paragraph) Plaintiff, J. C. Ballentine, and other plaintiffs of the class similarly situated did not receive any notice of the intention to introduce local legislation and as property owners and affected parties did not consent and will not consent to annexation into the municipal limits of the City of Waycross Georgia, and did not request and will not request the passage of such local legislation. Said local or special legislation was unlawfully initiated, introduced and passed, and such action violated the constitutional rights of plaintiff.

25. Acts 1946 p. 82 codified as Section 47-801 Georgia Code Annotated, and the notice of

intention to introduce local legislation pursuant thereto, are unconstitutional, null and void as being plainly violative of the Fourteenth Amendment to the Constitution of the United States of America, as interpreted and applied by the Supreme Court of Georgia and the Supreme Court of the United States being violative of due process and equal protection of the laws, as such general law does not provide for notice and hearing as a matter of right either in express terms or by necessary implication and the alleged conflict with the Georgia Constitution and the United States Constitution is plain and palpable. Plaintiffs specifically put in contest the constitutionality of this general statute and allege that all actions and procedures pursuant to the unconstitutional notice deprive them of their rights of citizenship and deprive them of their property in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States of America. Should an ex parte restraining order not issue, plaintiffs would be endangered by the possible application of the judicial doctrine of argumentum ab inconvenienti."

The complaint alleged in detail the violation of equal protection of law guaranteed by the Amendment Fourteen of the Constitution of the United States, setting forth the delegation of authority for annexation in this case from the general assembly to the municipality by general law; the applicability of the general statutes to this case; the declared intention of the general assembly by general law that no local or special laws shall be enacted on subject-matters over which municipalities are authorized to act pursuant to said sections; the prohibition against the annexation of territory not contiguous to the municipal limits; the prohibition against granting tax concessions and

exemptions; and other factual violations of equal protection of laws basically set forth in paragraphs numeric 11, 12, 13, 15, 17, 18, 19, 20, 21, 22, and 24 of the complaint.

The complaint alleged in detail the violation of substantive due process guaranteed by Amendment Fourteen of the Constitution of the United States, setting forth the absence of comity of interest between the territory annexed and the municipality; the absence of any public interest to be served by annexation; the absence of any showing or attempt at showing of a public interest; the showing that by delaying annexation for three years and ten months no pressing public interest existed; the facts denying contiguity of the territory; the absence of area planning for orderly municipal development; the existence of a local public body for the determination of whether such annexation is substantially of benefit to the public and bears a substantial relation to public health, safety, morality, or general welfare which outweighs private interests and their injury or loss; the confiscatory nature of the annexation; the existence of an arbitrary, capricious annexation policy of the City of Waycross and the exercise of such arbitrary, capricious and confiscatory policy in this case; the exercise of this annexation based not upon standards with regard to the public interest but rather upon coersive annexation through control of the only sewage disposal plant operated with Environmental Protection Agency approval in the Court of Ware; and other factual violations of substantive due process basically set forth in paragraphs numeric 11, 12, 14, 16, 20, and 26 of the complaint.

Defendants made a motion to dismiss the complaint for failure to state a claim. The motion was argued

orally. Appellants urged their contentions as hereinafter set forth. Defendants argued that the annexation was not commenced at the request of the property owners; that no oral or written notice was given to anyone and that none was required; that no consent was given for the annexation and that none was required; that the published notice complied in all respects with Georgia law; that the annexation was accomplished by the General Assembly and therefor was not violative of due process of law whether procedural or substantive, and not violative of equal protection of laws; that the General Assembly had full and unlimited power to annex the territory by local act. The hearing of the motion to dismiss was held before any discovery and judgement was rendered at the close of oral argument without briefs, dismissing the complaint for failure to state a claim.

Appellants appealed this decision to the Supreme Court of Georgia and set forth in their brief the following contentions for decision:

1. Appellants submit that the power to extend city limits and annex territory can be delegated by the General Assembly and exercised by the municipalities subject only to statutes of general application pertaining to municipalities. pp. 3-4

2. Appellants submit that Section 1 of the annexation statute of 1962, Ga. L. 1962, p. 119; Code Ann. Sec. 69-902 is a statute of general application pertaining to municipalities which by its terms provides for the annexation of territory under "the 100% method". pp. 4-5

3. Appellants submit that either the annexation statute of 1962 as amended; Code Ann. Sec. 69-902, or the annexation statute of 1966; Code Ann. Sec. 69-904,

is the applicable general law and that statutory provisions prohibit the enactment of a special law in any case for which provision has been made by an existing general law. pp. 5-6

4. Appellants submit that the annexation statute of 1970, Ga. L. 1970, p. 426, as amended; Code Ann. Sec. 69-913 et seq., is a statute of general application pertaining to municipalities which provides an alternative method for the annexation of territory without the written consent of the property owners and the use of this method would be authorized in the event the City did not in fact institute annexation procedures at the request of the property owners. pp. 6

5. Appellants submit that annexation of the territory by special local legislation Ga. L. 1972, pages 2970 through 2972 is violative of the Constitution, Article I, Section IV, paragraph I; Code Ann. Section 2-401, which provides that laws of a general nature shall have uniform operation throughout the State, and no special act shall be enacted in any case for which provision has been made by an existing general law. pp. 6-7

6. Appellants submit that the enactment of the special legislation complained of violated their rights as protected by Amendment Fourteen of the Federal Constitution, Article I, Section I, Paragraph III; Code Ann. Sec. 2-103, and Article I, Section IV, Paragraph I, Code Ann. Sec. 2-401, Constitution of Georgia, pp. 7-11

7. Appellants submit the notice provisions of Ga. L. 1946, pp. 82-83, Code Ann. Sec. 47-801, to be unconstitutional as being violative of Amendment 14 Section 1 of the Constitution of the United States and Article 1, Section 1, Paragraph III of the Constitution of Georgia; Code Ann. Sec. 2-103. The constitutionality

of the statute is placed directly in issue particularly as applied to plaintiffs in this action. Included in this contention is the question of whether the special act which annexed the territory could have been introduced without oral or written notice to the property owners and appellants who held leasehold estates from the property owners. The effect of the annexation was to remove the territory and their respective business situs from the jurisdiction of the County of Ware and place the territory and their respective business situs subject to the jurisdiction of the City of Waycross in violation of their rights as protected by Amendment 14 of the Constitution of the United States and Article 1, Section 1, Paragraph III of the Constitution of Georgia; Code Ann. Sec. 2-103. pp. 11-15

8. Appellants submit that the special legislation to annex the territory, Ga. L. 1972, pages 2970 through 2972, to be unconstitutional and void as being violative of Amendment 14, Section 1, of the Constitution of the United States, Article 1, Section 1, Paragraph 3 of the Constitution of Georgia; Code Ann. Sec. 2-103; and Article I, Section IV, Paragraph I of the Constitution of Georgia; Code Ann. Sec. 2-401 in that special legislation was enacted affecting private rights and varying general law affecting private rights without the free consent in writing of any person to be affected thereby. pp. 15-16

9. Appellants contend that notice and consent are separate and distinct requirement under the Constitution of the United States and the Constitution of Georgia. Notice is the general requirement for due process. Consent is the special requirement of Article I, Section IV, Paragraph I; Code Ann. Sec. 2-401. pp. 16-17

10. Appellants submit that the territory known as Hatcher Point Mall is not contiguous to the municipal limits at the time of annexation and therefore was not properly annexed by the special legislation complained of, Ga. L. 1972, pages 2970 through 2972. pp. 18-22

11. Appellants submit that unless annexation is substantially of benefit to the public and bears a substantial relation to public health, safety, morality or general welfare which outweighs private interests and their injury or loss, the annexation is confiscatory and void as being violative of Amendment 14 of the Federal Constitution and Article 1, Section 1, Paragraph III; Code Ann. Sec. 2-103, pp. 22-24

12. Appellants submit that the purpose for fixing the effective date as of January 1, 1975, and thereafter introducing special legislation to extend the effective date of annexation to January 1, 1976 was for the purpose of granting to the developers an unlawful and unconstitutional exemption from City ad valorem taxation in violation of equal protection of the law, Amendment 14 of the Constitution of the United States, and Article VII, Section 1, Paragraphs I through IV inclusive; Code Ann. Secs. 2-5401, 2-5402, 2-5403, 2-5404. pp. 24-27

13. Appellants submit that evidence should be taken to determine whether the proposed legislation for the purpose of annexation was subject to the Voting Rights Act of 1965 as amended which requires a determination of applicability by the Federal Attorney General or District Court of Washington, D.C., prior to the introduction of the legislation; 42 U.S.C. 1973 c (1970). pp. 27-28

14. Appellants submit that the general law applicable to annexations without the consent of the property

owners is provided for in Ga. L. 1970 p. 426; Code Ann. Sec. 69-913 et seq. p. 28

15. Appellants submit that the City has adopted and proceeded under an arbitrary and capricious policy for annexation in violation of Amendment 14 of the Constitution of the United States and Article 1, Section 1, Paragraph 3; Code Ann. Sec. 2-103, based not upon standards with regard to the public interest but rather upon coersive annexation through control of the only sewage disposal plant operated with Environmental Protection Agency approval in the County of Ware. pp. 28-29

16. Appellants allege unlawful coercion, arbitrary and capricious conduct by the City which is in violation of due process of law and equal and uniform application of law. pp. 29-30

17. Appellants submit that notices provided for by Article III, Section VII, Paragraph XV of the Constitution of Georgia; Code Ann. Sec. 2-1915 are for the purpose of putting the citizens and local governments on notice of an intention to enact special legislation whose subject matter constitutes a general law within the jurisdictional limits of the affected local government. The use of such a notice to enact special legislation whose subject matter is annexation which affects private rights, except with the free consent in writing of all persons to be affected thereby, violates Article 1, Section IV, Paragraph 1; Code Ann. Sec. 2-401 and Amendment 14 of the Constitution and Article 1, Section 1, Paragraph III of the Constitution of Georgia; Code Ann., Sec. 2-103, pp. 30-32

18. Appellants submit that the motion to dismiss was improperly granted for failure to state a claim upon which relief can be granted. pp. 32-33

The Supreme Court of Georgia held:

(a) "It has always been within the power of the General Assembly to extend or diminish the corporate limits of a municipality and there is no merit in this contention. Lee v. City of Jesup, 222 Ga. 530 (1) (150 SE 2d 836) (1966).

(b) Until the effective date of the Act, the owners of the property and the plaintiffs, as tenants, all had the same standing insofar as ad valorem taxes, licenses and occupational taxes were concerned. Neither the owners or tenants were liable for municipal taxes or licenses and therefore no exemption was involved.

(c) The plaintiffs alleged that they were not given notice of the proposed annexation. Personal notice is not required. The Acts in question show notice by publication as required by the Constitution (Code Ann. 2-1915), and the statute (Code Ann. 47-801). There is no merit in this contention.

(d) The trial court did not err in dismissing the petition for failure to state a claim."

FEDERAL QUESTIONS ARE SUBSTANTIAL

Where final decision of state court has sustained validity of state statute challenged on federal constitutional grounds, appeal to the United States Supreme Court lies as a matter of right under United States Code, Title 28, Section 1257 (2). *Huffman v. Pursue, Ltd.* (1975) 420 U.S. 592.

In finding that it has appellate jurisdiction under 28 U.S.C.S. 1257 (2) the Court will also take jurisdiction over any aspect of case which would otherwise fall solely within certiorari jurisdiction. *Cox Broadcasting Corp. v. Cohn* (1975) 43 L.Ed.2d 328.

Appeal from state court declaratory judgement proceeding as to the validity of a state statute under the Fourteenth Amendment of the Constitution presented a justiciable case or conflict. *Railway Mail Association v. Corsi* (1945) 326 U.S. 88.

Under 28 U.S.C.S. 1257 (2) three things must concur to give jurisdiction: 1. The validity of a statute of a state, or of an authority exercised under a state, must be drawn in question; 2. It must be drawn in question upon the ground that it is repugnant to the constitution, treaties or laws of the United States; 3. The decision of the State court must be in favor of their validity. *Commonwealth Bank v. Griffith* (1840) 10 L.Ed. 352; *Walker v. Tailor* (1847) 12 L.Ed. 52.

Since *Hunter v. Pittsburg* (1907) 207 U.S. 161, the interior courts have erred by holding, directly or indirectly that the Fourteenth Amendment to the Constitution of the United States is inapplicable to cases concerning legislative and municipal annexation.

In *Gomillion v. Lightfoot* (1960) 364 U.S. 339 this Court warned that although the power of a legislature in matters of annexation is broad, it is not absolute and the Constitution of the United States cannot be ignored. The inferior courts have continued to ignore this caution.

In affirming the validity of Georgia Laws, 1946, pp. 82-83, codified as Section 47-801, the Georgia Code, the Supreme Court of Georgia chose to ignore the dictates of the Supreme Court of the United States by holding that the due process clause of the Fourteenth Amendment to the United States does not require personal actual notice when the affected parties are both known and limited in number, but rather that a published skeleton notice is all that is required under

the constitution and laws of the State of Georgia. The contested statute was enacted in 1946, prior to the landmark decisions in *Mullane v. Central Hanover Bank & Trust Co.* (1949) 339 U.S. 306 and *Walker v. City of Hutchinson* (1956) 352 U.S. 112.

Section 47-801 of the Georgia Code, provides only for the publication of a notice of intention to introduce legislation, and does not provide for actual notice to known property owners; does not require the identification of property owners to be affected by the introduction of said special legislation; does not provide for a reasonable time or place for those interested in or affected by such legislation to make their appearance and be heard; does not attempt in any way to reach those persons and parties to be finally affected by such special legislation; and does not comply in any way with the requirements of due process of law and is plainly violative of the Fourteenth Amendment to the Constitution of the United States. *Hunter v. Pittsburg* (1907) 207 U.S. 161; *Mullane v. Central Hanover Bank & Trust Co.* (1949) 339 U.S. 306; *Covey v. Town of Somers* (1955) 351 U.S. 141; *Walker v. City of Hutchinson* (1956) 352 U.S. 112; *Shroeder v. City of New York* (1962) 371 U.S. 208; *Robinson v. Hanrahan* (1972) 409 U.S. 38.

The passage of Georgia Laws 1972 without actual notice to known property owners and without any notice other than by publication pursuant to Section 47-801 of the Georgia Code is violative of, and repugnant to the due process clause of the Fourteenth Amendment to the Constitution of the United States of America. *Hunter v. Pittsburg* (1907) 207 U.S. 161; *Mullane v. Central Hanover Bank & Trust Co.* (1949) 339 U.S. 306; *Covey v. Town of Somers* (1955) 351

U.S. 141; *Walker v. City of Hutchinson* (1956) 352 U.S. 112; *Shroeder v. City of New York* (1962) 371 U.S. 208; *Robinson v. Hanrahan* (1972) 409 U.S. 38.

The complaint and brief of appellants before the Supreme Court of Georgia contested Georgia Laws 1972 pp. 2970-2972, as amended, and the annexation of territory thereby, as being violative of equal protection of laws guaranteed by the Fourteenth Amendment to the Constitution of the United States. The issues presented were, among others, the delegation of authority for annexation in this case from the general assembly to the municipality by general law; the applicability of the general statutes to this case; the declared intention of the general assembly by general law that no local or special laws shall be enacted or subject matters over which the municipalities are authorized to act pursuant to said sections; the prohibitions against the annexation of a territory not contiguous to the municipal limits; the prohibitions against granting tax concessions and exemptions. The Supreme Court of Georgia did not consider the Constitution of the United States and disposed of these issues by holding that no tax exemptions had been granted and that the general assembly has the power to extend or diminish the corporate limits of a municipality. The substantial federal constitutional issues were not considered. 26 ALR 2 647, 650, 651; 75 AM. Jur. 2d Statutes 39.

In the field of taxation, and particularly on the issue of unlawful tax motive, the Supreme Court of the United States has applied the maxim "that which cannot be done directly cannot be done by indirection" and have consistently sought for the substance of the matter. When the issue of motive has been raised, the

federal judiciary have required the original court to establish evidence as to motives and thereby factually determine the issue. *Gregory v. Helvering* (1935) 293 U.S. 465, *Commissioner v. Tower* (1946) 327 U.S. 280, *Gomillion v. Lightfoot* (1960) 364 U.S. 339, 347 citing: *U.S. v. Reading Co.* 226 U.S. 374 and *Western U. Tel. Co. v. Foster* 247 U.S. 105.

The complaint and briefs of appellants before the Supreme Court of Georgia contested Georgia Laws 1972, pp. 2970-2972, as amended, and the annexation of territory thereby, as being violative of due process clause of the Fourteenth Amendment to the Constitution of the United States. The issues presented were, among others, the absence of comity of interest between the territory annexed and the municipality; the absence of any public interest to be served by annexation; the absence of any showing or attempt at showing of a public interest to be served by annexation; the absence of any showing or attempt at showing of a public interest; the fact that the delay of three years and ten months from the passage of legislation to its effective date shows that there is no pressing public interest to be served; the absence of contiguity between the territory annexed and the municipality; the absence of planning for orderly municipal development; the existence of an authorized public body for the determination of whether such annexation is substantially of benefit to the public; the avoidance of a determination by such public body; the lack of a substantial relation to public health, safety, morality or general welfare which outweighs private interests and their injury or loss; the confiscatory nature of the annexation; the existence of an arbitrary, capricious, confiscatory policy of annexation in Waycross, Georgia,

and the exercise of such arbitrary, capricious and confiscatory policy in this case; the annexation of territory based not upon standards with regard to the public interest but rather upon coersive annexation through control of the sewage disposal plant operated with Environmental Protection Agency approval in the County of Ware.

The Supreme Court of Georgia did not consider the Constitution of the United States and did not rule on these substantial federal constitutional questions other than by denying all by entering judgement affirming the dismissal of the complaint for failure to state a claim. *Nectow v. City of Cambridge* (1928) 277 U.S. 183.

When a special local act is passed in 1972 for the purpose of annexation of territory effective January 1, 1976, it cannot be said that such annexation serves a pressing public interest.

The Constitution has historically protected the rights of citizens against the possibility of legislative tyranny. *Pirie v. Kamps* 68 Wyo. 83 (1951) 26 ALR 2 647, 650, 651.

We respectfully submit that the Fourteenth Amendment to the Constitution of the United States must be applied in this case in order to protect the private rights and property rights of citizens.

The existing rule of law in Georgia gives the legislative full power to annex any territory touching a public road or river anywhere in the state, to any municipality in the state, without giving actual notice to the known property owners. All that is required as a condition precedent is that the municipality requesting such annexation publish a notice of intention to introduce such legislation in the official local gazette. The published notice does not have to describe the

property to be annexed and does not have to be directed to known property owners, and does not have to be reasonably calculated to reach affected persons. There is neither the opportunity nor the right to be heard. The annexation can be effective in the distant future; the passage of four years not being unreasonable as there is no requirement that a pressing public interest be served by the annexation. The Fourteenth Amendment to the Constitution of the United States is not to be considered applicable to matters involving annexation. *Municipal Annexation in Georgia*, Georgia Law Review Vol. 9, No. 1, (1974) pp. 167-187; *Municipal Annexation in Georgia*, Georgia Law Review Vol. 5, No. 3 (1971) pp. 499-528; *Selected Oddities in Georgia Municipal Law*, Georgia Law Review Vol. 9, No. 4 (1975) pp. 783, 800-801; *Ballentine v. Willingham* (1976).

CONCLUSION

Appellants submit that this appeal brings before the court substantial federal questions which require plenary consideration, with briefs on the merits and oral argument, for their resolution.

W. J. JACQUES, JR.
P. O. Box 447
Waycross, Georgia 31501
Attorney for Appellants

APPENDIX A

In the Supreme Court of Georgia. JUN 08 1976

Decided:

31127. BALLENTINE ET AL. v.
WILLINGHAM ET AL.

NICHOLS, Chief Justice.

The appellants brought a declaratory judgment action, naming officials of the City of Waycross as defendants, in which they sought to have Ga. L. 1972, pp. 2970-2972 declared unconstitutional. The Act annexed a certain area into the City of Waycross effective January 1, 1975. Such Act was amended in 1973 (Ga. L. 1973, pp. 3216-3218), to change the effective date to January 1, 1976. The appellants contend the delay in the effective date of the Act resulted in an illegal exemption from city ad valorem taxes for the years 1973, 1974 and 1975 and that the property annexed does not meet the legislative standards set forth in Ga. L. 1970, pp. 426-435. It is also contended that the passage of the Alternative Method of Extending Municipal Boundaries Act (a general law) took away the legislative authority to pass local acts annexing territory to municipal corporations. The trial court dismissed the complaint for failure to state a claim and the plaintiffs appeal.

1. The Act of 1970, supra, is entitled "Alternative Method of Extending Municipal Boundaries" and it is stated in the enacting clause: "An Act to provide an alternative method, cumulative to existing methods . . ."

It has always been within the power of the General Assembly to extend or diminish the corporate limits of a municipality and there is no merit in this contention. *Lee v. City of Jesup*, 222 Ga. 530 (1) (150 SE2d 836) (1966).

2. The appellants are tenants of a shopping mall located within the annexed area. Their leases provide that after the second year each lessee shall pay the proportionate amount of any increase in ad valorem taxes as the square footage of their leased premises bears to the square footage of the whole mall. The appellants contend that this provision of their leases, coupled with the effective date of January 1, 1976, amount to an exemption of taxes to the owners and developers of the shopping mall.

Until the effective date of the Act, the owners of the property and the plaintiffs, as tenants, all had the same standing insofar as ad valorem taxes, licenses and occupational taxes were concerned. Neither the owners or tenants were liable for municipal taxes or licenses and therefore no exemption was involved.

3. The plaintiffs alleged that they were not given notice of the proposed annexation. Personal notice is not required. The Acts in question show notice by publication as required by the Constitution (Code Ann. §2-1915), and the statute (Code Ann. §47-801). There is no merit in this contention.

The trial court did not err in dismissing the petition for failure to state a claim.

Judgment affirmed. All the Justices concur.

APPENDIX B

CITY OF WAYCROSS–CHARTER AMENDED–CORPORATE LIMITS EXTENDED.

No. 1116 (House Bill No. 1916).

An Act to Amend an Act providing and establishing a new charter for the City of Waycross, approved August 17, 1909 (Ga. L. 1909, p. 1456), as amended, so as to extend the corporate limits of the City of Waycross; to provide for an effective date; to repeal conflicting laws; and for other purposes.

Be it enacted by the General Assembly of Georgia:

Section 1. An Act providing and establishing a new charter for the City of Waycross, approved August 17, 1909 (Ga. L. 1909, p. 1456), as amended, is hereby amended by adding thereto a new section to be designated section 2A, to read as follows:

"Section 2A. From and after January 1, 1975, the corporate limits of the City of Waycross shall be extended so as to include within said corporate limits the following described tract of land:

All that tract of land lying and being in Ware County, Georgia, and adjacent to the present City Limits of Waycross, Georgia, described as follows: Beginning at a point on the southwestern margin of the right of way of U.S. Highway No. 1 at its intersection with the present southeastern City Limits of the City of Waycross, Georgia, and thence running in a southerly and southeasterly direction along the southwestern margin of the right of way of said highway to a point,

which point is directly opposite the point of intersection of the northeastern margin of the right of way of said highway with the northwestern margin of the right of way of a county maintained access road which is also known as Hatcher Drive; running thence north 45°51′ 01″ east across said U.S. Highway No. 1 to the point of intersection of the northeastern margin of the right of way of U.S. Highway No. 1 with the northwestern margin of the right of way of the county maintained access road which is also known as Hatcher Drive; thence running north 45° 51′ 01″ along the northwestern margin of said county maintained access road a distance of 845.328 feet to a point; running thence northeasterly and northerly along the arc of the curve of the northwest and west line of the right of way of said county maintained access road which arc has a chord as measured north 27° 23′ 30″ east of 433.755 feet, a distance of 460.62 feet to a point; running thence north 09° 08′ 36″ east a distance of 109.247 feet to an iron pin set; running thence north 65° 25′ 21″ west a distance of 1,591.281 feet to an iron pin set on the west line of Land Lot 205 in the 8th Land District of Ware County, Georgia; running thence south 00° 33′ 58″ east along the west line of said Land Lot 205 a distance of 502.014 feet to an iron pin found; running thence south 00° 33′ 58″ east along the west line of said Land Lot 205 a distance of 628.266 feet to an iron pin on the northeastern margin of the right of way of U.S. Highway No. 1; thence running in a northerly and northwesterly direction along the northeastern margin of the right of way of U.S. Highway No. 1 to a point on said right of way, which point is the point of intersection of said northeastern margin of said right of way with the

present southeastern City Limits of the City of Waycross; thence running in a southwesterly direction along said present City Limits to the point or place of beginning."

Section 2. The jurisdiction, authority, ordinances, rules and regulations of the City of Waycross shall extend and apply to the territory described in section 1 of this Act.

Section 3. This Act shall become effective on January 1, 1975. Effective date.

Section 4. All laws and parts of laws in conflict with this Act are hereby repealed.

Notice of Intention to Introduce
Local Legislation.

Notice is hereby given that there will be introduced at the regular 1972 session of the General Assembly of Georgia, a bill to amend the charter of the City of Waycross, so as to change the corporate limits thereof by incorporating at the request of the property owners a certain tract of land; and for other purposes.

This 4th day of February, 1972.

/s/ Walter R. Vollenwelder,
Mayor, City of Waycross

Georgia, Ware County.

Before me, the undersigned officer, duly authorized by law to administer oaths, personally appeared Jack Williams, Jr., Editor and Publisher of Waycross Journal-Herald, the official organ of the City of Waycross and the newspaper in Ware County, Georgia, wherein sheriff's sales are advertised and which has a general circulation in Ware County, who, first being

sworn, on oath, states that the above and foregoing notice of intention to apply for passage of local legislation was published in the Waycross Journal-Herald in its issues of February 5, 12 and 19, 1972.

/s/ Jack Williams, Jr.

Sworn to and subscribed before me,
this 19th day of February, 1972.

/s/ Betty R. Kathavech,

Notary Public, Ware County, Georgia.
My Commission Expires February 11, 1975.
(Seal).

Approved March 27, 1972.

APPENDIX C

CITY OF WAYCROSS–CHARTER AMENDED–EFFECTIVE DATE OF CERTAIN PROVISIONS CHANGED.

No. 567 (House Bill No. 838).

An Act to amend an Act providing and establishing a new charter for the City of Waycross, approved August 17, 1909 (Ga. L. 1909, p. 1456), as amended, particularly by an Act approved March 27, 1972 (Ga. L. 1972, p. 2970), so as to change the effective date of certain provisions of said 1972 amendatory Act; to repeal conflicting laws; and for other purposes.

Be it enacted by the General Assembly of Georgia:

Section 1. An Act providing and establishing a new charter for the City of Waycross, approved August 17, 1909 (Ga. L. 1909, p. 1456), as amended, particularly by an Act approved March 27, 1972 (Ga. L. 1972, p. 2970), is hereby amended by striking from section 3 of said 1972 amendatory Act the following:

"January 1, 1975",

and inserting in lieu thereof the following:

"January 1, 1976",

so that when so amended, section 3 of said 1972 amendatory Act shall read as follows:

"Section 3. This Act shall become effective on January 1, 1976."

Section 2. All laws and parts of laws in conflict with this Act are hereby repealed.

Notice of Intention to Introduce
Local Legislation.

Notice is hereby given that there will be introduced at the regular 1973 session of the General Assembly of Georgia a bill to amend the Act approved March 27, 1972 (Ga. L. 1972, p. 2970), which Act incorporated a tract of land into the Waycross corporate limits at the request of the property owners, so as to change the effective date of said Act from January 1, 1975 to January 1, 1976.

This 19th day of January, 1973.

R. W. Willingham,
Mayor,
City of Waycross

Georgia, Ware County.

Before me, the undersigned officer, duly authorized by law to administer oaths, personally appeared Jack Williams, Jr., Editor and Publisher of Waycross Journal-Herald, the official organ of the City of Waycross and the newspaper in Ware County, Georgia, wherein sheriff's sales are advertised and which has a general circulation in Ware County, who, first being sworn, on oath, states that the above and foregoing notice of intention to apply for passage of local legislation was published in the Waycross Journal-Herald in its issues of January 20, 27 and February 3, 1973.

/s/ Jack Williams, Jr.

Sworn to and subscribed before me,
this 13th day of February, 1973.

/s/ Betty R. Katkaveck
Notary Public, Ware County, Georgia
My Commission Expires February 11, 1975.
(Seal).

Approved April 17, 1973.

APPENDIX D.

NOTICE OF INTENTION TO ASK LOCAL LEGISLATION

§47-801
No. 567

An Act To amend Section 47-801 of the Code of Georgia of 1933 relating to the notice of intention to apply for passage of local bills, by striking said section in its entirety and substituting in lieu thereof a new section to be numbered 47-801; to repeal all conflicting laws; and for other purposes.

Be it enacted by the General Assembly of the State of Georgia, and it is hereby enacted by authority of the same:

Section 1. From and after the passage of this Act, Section 47-801 of the Code of Georgia of 1933, relating to publication of notice of intention to ask local Legislation necessary, be, and the same is hereby, amended by striking said section in its entirety, and substituting in lieu thereof a new section to be numbered 47-801, relating to the notice of intention to apply for passage of local bills, said Section to read as follows, to-wit:

> No local or special bill shall be passed, unless notice of the intention to apply therefor shall have been published in the newspaper in which the Sheriff's advertisements for the locality affected are published, once a week for three weeks during a period of sixty days immediately preceding its introduction into the General Assembly. No local or special bill shall become law unless there is

attached to and made a part of said bill a copy of said notice certified by the publisher, or accompanied by an affidavit of the author, to the effect that said notice has been published as provided by law. No office to which a person has been elected shall be abolished, nor the term of the office shortened or lengthened by local or special bill during the term for which such person was elected unless the same be approved by the people of the jurisdiction affected in a referendum on the question. Where any local law shall add any member or members to any municipal or county governing authority, the members of which are elected by the people, such local law must provide that the member or members so added must be elected by a majority vote if the qualified voters of the political subdivision affected.

Section 2. Be it further enacted by the authority aforesaid that all laws and parts of laws in conflict with this Act be, and the same are hereby, repealed.

Approved January 31, 1946.

APPENDIX E

IN THE

SUPREME COURT OF GEORGIA

No. 31127

J. C. BALLENTINE,
HATCHER POINT MALL MERCHANTS' ASSOCIATION, INC., ET AL,

Appellants,

VS.

R. W. WILLINGHAM, R. L. TONNING, C. C. McCRAY, SAM DUBOSE, T. HENRY CLARKE, as Commissioners of the City of Waycross; TOM GATTIS, as City Clerk and Treasurer of the City of Waycross; AL CRACE, as City Manager, and THE CITY OF WAYCROSS, GEORGIA, ET AL,

Appellees.

NOTICE OF APPEAL
REQUEST FOR CERTIFICATION AND
TRANSMISSION OF THE RECORD.

W. J. JACQUES, Jr.
P.O. Box 447
Waycross, Georgia 31501

Attorney for Appellants

NOTICE OF APPEAL

NOW COME J. C. Ballentine, Hatcher Point Mall Merchants' Association, Inc. et al, appellants, and file this their notice of appeal to the Supreme Court of the United States of America with the Honorable Clerk of the Supreme Court of the State of Georgia.

Appellants do hereby appeal from the judgement of the Supreme Court of the State of Georgia, decided June 8, 1976, affirming the judgement of the Superior Court of Ware County, Georgia, dismissing plaintiffs' complaint for failure to state a claim.

The final judgement of the Supreme Court of the State of Georgia, decided June 8, 1976, has sustained the validity of Georgia Laws 1946 page 82, codified as Section 47-801 Georgia Code Annotated, challenged on federal constitutional grounds as being violative of and repugnant to Amendment 14 of the Constitution of the United States of America.

The final judgement of the Supreme Court of the State of Georgia, decided June 8, 1976, has sustained the validity of Georgia Laws 1972 pages 2970 through 2972, as amended Georgia Laws 1973 pages 3216 through 3218, challenged on federal constitutional grounds, as being violative of and repugnant to Amendment 14 of the Constitution of the United States of America.

This appeal to the Supreme Court of the United States of America is taken under authority of United State Code Title 28, Section 1257.

This 23 day of July, 1976.

W. J. Jacques, Jr.
Attorney for Appellants

W. J. Jacques, Jr.
Attorney at Law
P. O. Box 447
Waycross, Georgia 31501
912-283-4040

REQUEST FOR CERTIFICATION AND TRANSMISSION OF THE RECORD.

To: The Hon. Clerk, Supreme Court of Georgia.

You are respectfully requested to certify the record in this case and provide for its transmission to the Supreme Court of the United States of America.

This 23 day of July 1976.

W. J. Jacques, Jr.
Attorney for Appellants.

W. J. Jacques, Jr.
Attorney at Law
P.O. Box 447
Waycross, Georgia 31501
912-283-4040

GEORGIA
WARE COUNTY

ACKNOWLEDGEMENT OF SERVICE

I, Wilson G. Pedrick, Attorney for appellees, do hereby acknowledge service of the Notice of Appeal dated July 23, 1976, as counsel of record for, and in behalf of each of the parties to the proceedings in the court where judgement appealed from was issued; and further do acknowledge receipt of Request for Certification and Transmission of the Record.

R. W. WILLINGHAM, R. L. TONNING, C. C. McCRAY, SAM DUBOSE, T. HENRY CLARKE, as Commissioners of the City of Waycross; TOM GATTIS, as City Clerk and Treasurer of the City of Waycross; AL CRACE, as City Manager, and THE CITY OF WAYCROSS, GEORGIA, ET AL, Appellees.

This 23 day of July, 1976.

Wilson G. Pedrick
Attorney for Appellees

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